Supreme Court, U. S.
FILED
APR 1 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1301

DUBUQUE COMMUNICATION CORPORATION,
Petitioner,

v.

AMERICAN BROADCASTING COMPANIES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION

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Dated: April 1, 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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COUNTERSTATEMENT OF THE CASE

This private treble damage antitrust action under Section 4 of the Clayton Act (15 U.S.C. § 15 (1970)) alleged that Respondent American Broadcasting Companies, Inc. ("ABC") violated Section 1 of the Sherman Act (15 U.S.C. § 1 (1970)) by conditioning per-

mission to broadcast ABC programs on a requirement that Petitioner use American Telephone and Telegraph ("AT&T") carrier services as a means of obtaining delivery of the ABC television signal to Petitioner's television station ("KDUB") in Dubuque, Iowa.

Petitioner stipulated it was ABC's policy not to tie access to ABC programs to use of any particular signal delivery carrier.

> *Stipulation of Fact.* 70. ABC stated policy as set forth in its Policies and Procedures books, provides that in those cases in which the station is responsible for part or all of its signal delivery, the station is permitted to utilize whatever method or methods the station chooses to receive network service (*e.g.*, AT&T, miscellaneous common carrier, private microwave, off-air, etc.) ABC's policy with respect to signal delivery is stated in printed books of ABC Policies and Procedures dated October 9, 1970 and October 1, 1972, copies of which were sent to KDUB on or about those dates. This policy was in effect in April 1970.[1]

However, Petitioner claimed that evidence of intent and of the particular circumstances surrounding the formation and operation of this otherwise routine contract would prove Petitioner was a singular exception to ABC policy.[2] Therefore, the trial court received evidence describing the parties, their intent and all of the conduct leading up to and including acceptance of the contract.[3] The court also received evi-

[1] Pretrial Order Attachment A, dated February 5, 1976, ¶ 70 at 19-20.

[2] *Id.*, trial tr. at 7-8.

[3] *E.g.* Trial tr. at 2-4, 8, 256-69, 360-68, 376, 483-86, 488-89, 580, 620-21, 625-32, 634-38, 644-48, 679-81; Pretrial Order Attachment A, dated February 5, 1976, ¶¶ 1-17, at 2-7.

dence of the conduct of the parties subsequent to the contract, including Petitioner's decision to discontinue AT&T delivery services in favor of a different method, the ABC assistance to Petitioner's operations which was made necessary by that change and ABC's subsequent renewal of the affiliation under those circumstances.[4]

Upon consideration of this evidence and post-trial submissions relating to ABC's Motion to Dismiss, the court made findings of fact and conclusions rejecting Petitioner's position and dismissing the complaint pursuant to Fed. R. Civ. P. 41(b). The court found Petitioner failed to prove "that its choice of AT&T delivery was the result of coercion on the part of ABC."[5] Moreover, the court held:

> The only coherent conclusion that can be drawn from this evidence is that plaintiff, which had reason to be aware of alternative signal transmission systems, knew the virtues and costs of AT&T delivery and had freely decided to use that method.[6]

On appeal Petitioner reversed its field and argued the extrinsic circumstances should have been ignored on the theory that the television affiliation agreement taken alone in effect raised an irrebuttable presump-

[4] *E.g.*, Trial tr. at 232-235, 568; Pretrial Order Attachment A, dated February 5, 1976, ¶ 87 at 22. The statement in the Petition that plaintiff is off the air may be misleading. ABC continued the affiliation with plaintiff until plaintiff ceased operations. Trial tr. at 232.

[5] Petitioner's Appendix B at 18.

[6] *Id.* at 14-15.

tion of a tie-in.[7] Thus, on appeal, Petitioner did not contend that the trial court's findings with respect to the extrinsic facts were unsupported or clearly erroneous.[8] Rather, Petitioner argued the provisions of the contract (when taken together with Petitioner's version of some but not all of the extrinsic evidence) [9] should have been held to imply a condition and it was error not to construe this implied condition to constitute the equivalent of coercion [10] (even in the face of a stipulation that it was against ABC policy to tie signal delivery via AT&T to access to programs and in the face of an uncontested finding that extrinsic evidence proved the absence of coercion in fact).

The court of appeals reviewed the contract and the extrinsic evidence and unanimously agreed that Petitioner failed to prove a required element of the antitrust violation charged.[11]

REASONS THE WRIT SHOULD NOT BE GRANTED

No question of law, policy or procedure warranting consideration by this Court is presented.

ARGUMENT

The first question Petitioner seeks to present (whether supply of a putative tied item by a third party renders the per se rules inapplicable) was not reached by the trial court and was not raised in the appellate court

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[7] Plaintiff's Opening Brief on Appeal, dated August 24, 1976, at 6.

[8] *Id.*

[9] *See infra* n. 18.

[10] Plaintiff's Opening Brief on Appeal, dated August 24, 1976, at 6.

[11] Petitioner's Appendix A, at 9-10.

below. It was not reached or raised below because the issue upon which Petitioner lost in the trial court was a factual prerequisite to antitrust liability under either the per se or rule of reason method of analysis. Petitioner lost on a question fundamental to section 4 of the Clayton Act [12] as well as section 1 of the Sherman Act:[13] causation.[14] ABC proved that in fact Petitioner used AT&T "by reason of" free and voluntary choice by Petitioner, not coercion by ABC.[15]

The second question Petitioner seeks to present (whether the television affiliation agreement was the "equivalent of a *contractual* conditioning") [16] was only a part of the larger threshold question of fact: why did Petitioner use AT&T? Coercion or free choice? Every facet of this question was resolved after trial by the court overwhelmingly and in all respects against Petitioner. First, it was found the terms of the contract alone did not state the condition Petitioner claimed.[17] As a matter of fact, it was found Petitioner's choice

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[12] 15 U.S.C. § 15 (1970).

[13] 15 U.S.C. § 1 (1970).

[14] *E.g., Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 128 (1969); *see Ungar* v. *Dunkin' Donuts of America, Inc.*, 531 F.2d 1211 (3d Cir.), *cert. denied*, 97 S. Ct. 74 (1976); *Plekowski* v. *Ralston Purina Co.*, 1975-2 Trade Cas. ¶ 60,411 (M.D. Ga. 1975).

[15] Section 4 of the Clayton Act allows recovery only by "[a]ny person who shall be injured in his business or property *by reason of* anything forbidden in the antitrust laws. . . ." (15 U.S.C. § 15 (1970)) (emphasis added). *Compare* Petitioner's Appendix B at 15.

[16] Petition at 2.

[17] Petitioner's Appendix B. Indeed Petitioner had conceded as much before trial in insisting that the court receive all the extrinsic evidence. Trial tr. 4-7; *see* Stipulation No. 70, quoted at p. 2, *supra*.

and use of the putative tied product were in all respects voluntary and the contract did not in operation impose the condition claimed.[18] That finding of fact was not challenged by Petitioner in the court of appeals as being unsupported by the evidence.[19] Thus Petitioner's argument in the court of appeals, like the second question it seeks to present to this Court, amounted to no more than the proposition that a so-called voluntary tie-in should be deemed to raise a presumption of liability irrebuttable by testimony or other extrinsic evidence.[20] This argument was rejected by the Seventh Circuit just as its underlying premise had been rejected by every circuit to consider it, including the Third Circuit in the case of *Ungar* v. *Dunkin' Donuts of America, Inc.,* in which certiorari was recently denied by this Court.[21]

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[18] The trial court's interpretation of the contract language, which was affirmed by a unanimous Court of Appeals, and which comported with the plain meaning of the words, ABC policy, the intent of the drafters and the conduct of the parties should not be reversed unless it is not reasonably capable of being read the way it was. *Richter* v. *Westab, Inc.,* 529 F.2d 896 (6th Cir. 1976); *G. & R. Corp.* v. *American Security & Trust Co.,* 523 F.2d 1164, 1173 (D.C. Cir. 1975); *Palmer* v. *Howard,* 493 F.2d 830, 835 (10th Cir. 1974); *Martin* v. *Vector Co.,* 498 F.2d 16, 22 (1st Cir. 1974). Petitioner is trying to re-argue the facts when in its second question presented (Petition, p. 2) it suggests ABC ordered the allegedly tied product, and therefore the "event" prospectively contemplated by the agreement had occurred. It had not occurred. The facts proved Petitioner placed the only operative order with AT&T; moreover, in any event, Petitioner had told ABC Petitioner wanted AT&T before either the affiliation agreement or Petitioner's Appendix E were prepared. *E.g.* Petitioner's Appendix B at 14-15, 18; trial tr. 366-67, 375-76, 603-04, 637-38, 648.

[19] *See supra* note 8.

[20] Petition at 7.

[21] *Ungar* v. *Dunkin' Donuts of America, Inc.,* 531 F.2d 1211 (3d Cir.), *cert. denied,* 97 S. Ct. 74 (1976); *Response of Carolina, Inc.* v. *Leasco Response, Inc.,* 537 F.2d 1307 (5th Cir. 1976); *American Mfrs. Mut. Ins. Co.* v. *American Broadcasting-Paramount Theatres, Inc.,* 446 F.2d 1131 (2d Cir. 1971), *cert. denied,* 404 U.S. 1063 (1972); *Capital Temporaries, Inc.* v. *Olsten Corp.,* 365 F. Supp. 888 (D. Conn. 1973), *aff'd* 506 F.2d 658 (2d Cir. 1974).

To understand Petitioner's post-trial retreat to reliance on a discredited theory of liability based on the contract alone, rather than the testimony, it should be noted that the testimony of Petitioner's chief witness turned out to be in crucial respects so contradicted by his prior testimony and by the testimony of others that the trial judge was constrained to inquire of Petitioner's witness: "Well, which testimony is the true testimony?"[22] Thus, Petitioner's position was and is nothing more than the obvious result of an effort to avoid the consequences of the trial court's evaluation of the credibility of witnesses.

The other reasons suggested by Petitioner for granting the writ are unexplained, have no apparent foundation in this case and are on their face without merit. Petitioner argues that this case would give the Court an opportunity to clarify its prior decisions in *Fortner Enterprises, Inc.*[23] and *Northern Pacific Ry. Co.*[24] Petitioner, however, does not suggest why either of these decisions need clarification or how this case would assist. *Fortner* was not even cited to the Seventh Circuit. Moreover, this court recently considered the *Fortner* case further in *United States Steel Corp.* v. *Fortner Enterprises, Inc.,* 45 U.S.L.W. 4171 (U.S. February 22, 1977) and held there was no tie-in.

Similarly, Petitioner's contention that this case is somehow important to the communications industry be-

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[22] Trial tr. at 364.

[23] *Fortner Enterprises, Inc.* v. *United States Steel Corp.,* 394 U.S. 495 (1969).

[24] *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1 (1958).

cause it involves the policies and practices of the broadcast networks cannot be reconciled with Petitioner's stipulation that it was ABC's policy not to require affiliated stations to use any particular means or method of signal delivery.[25]

Finally, it is suggested that the Court should consider this case in order to "give conformity to the holdings and policies of the various circuit courts of appeals."[26] However, Petitioner does not suggest any way in which the holding of any circuit court of appeals is at odds with the holding of this case.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: April 1, 1977

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[25] Petitioner also stipulated that in fact ABC affiliates used all manner and means of signal delivery. Pretrial Order Attachment A, dated February 5, 1976, ¶ 65 at 18-19.

[26] Petition at 7.